85-893

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO.

LARRY H. HUNT, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PAUL J. WELSH, II, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

APPENDIX

Rudolph L. Di Trapano, Esquire
DI TRAPANO & JACKSON
604 Virginia Street, East
Charleston, West Virginia 25301

APPENDIX I
OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5211

United States of America,
Appellee,

v.

Larry H. Hunt,
Appellant.

No. 81-5212

United States of America,
Appellee,

v.

Paul John Welsh II,
Appellant.

No. 82-1827

United States of America,
Appellee,

v.

Paul J. Welsh II,
Appellant.

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, Jr., District Judge. (CR 80-20038-01; CR 80-20038-02; CR 80-20038).

Argued February 5, 1985 Decided August 14, 1985

Before RUSSELL and MURNAGHAM, Circuit Judges, and Haynsworth, Senior Circuit Judge

PER CURIAM:

Appellants Larry H. Hunt and Paul J. Welsh seek reversal of their convictions for involvement in a scheme to defraud investors of $1.86 million in a coal lease tax shelter known as Ranger Mining Associates, Ltd. ("Ranger").

Hunt and Welsh, along with two co-defendants, Midwest Consolidated Coal Co., Inc. and Jack M. Cline, were indicted in October of 1980 in a thirteen count indictment on charges of conspiracy (18 U.S.C. § 371), wire fraud (18 U.S.C. § 1343) and inducing others to travel in interstate commerce in the execution of a scheme to defraud (18 U.S.C. § 2314).

After a five day jury trial in May, 1981 during which Hunt was represented by private counsel and Welsh by an appointed federal public defender, the jury rendered its verdict as to each defendant.[1] Subsequently Hunt was

---

[1] Hunt and Midwest were the only defendants convicted on the conspiracy count. The jury was unable to reach a verdict as to Welsh and Cline, the other co-defendants, on that charge. Hunt was additionally convicted on two interstate

sentenced to concurrent three year terms of imprisonment on each of seven counts, concurrent five year probation on two counts and fined $36,000. Welsh was sentenced to concurrent three year terms on each of three counts, concurrent five year probation on two counts and fined $14,000. The court also ordered Welsh to reimburse the United States $19,000, for the services of his court-appointed counsel, on the ground that he had been

---

travel counts and six of the wire fraud counts. The jury was unable to reach a verdict on the remaining four counts charging improper interstate travel. Welsh was acquitted of one wire fraud offense, convicted on one interstate travel count and four wire fraud counts. The jury was unable to reach a verdict on the six remaining counts charging improper interstate travel and wire fraud. Cline was acquitted on four wire fraud counts and the jury was unable to reach a verdict on the remaining nine counts against him.

financially able to retain private counsel to represent him during the proceedings.

The pointing by the defendants to inconsistent treatment of the case by the jury, as evidenced by apparently conflicting verdicts between counts and defendants, need not long detain us. The evidence sufficed to support the verdicts of guilty. United States v. Parodi, 703 F.2d 768, 790 (4th Cir. 1980). The government presented proof of a plan to mulct investors in a coal mining venture of some $1.86 million dollars in advance payments. The total lack of production of any coal by the Ranger venture was established. Proof of false representations, of incidents of

interstate travel and of use of the telephone in implementing the scheme was introduced. The jurors each were individually polled to assure that the verdicts reflected their true positions. United States v. Blankenship, 707 F.2d 807, 810 (4th Cir. 1983). Consistency in the several components of a verdict simply is not required. United States v. Powell, 105 S.Ct. 471, 476-477 (1984); Dunn v. United States, 284 U.S. 390, 393 (1932); United States v. Harris, 701 F.2d 1095, 1102-04 (4th Cir. 1983); United States v. Arrington, 719 F.2d 701, 705 (4th Cir. 1983).

The defendants further assert, as grounds for reversal of their convictions, the introduction by the

prosecution of similar acts for specific limited purposes. The evidence concerned involvement by the defendants in other coal venture limited partnerships[2] and was introduced by the prosecution to rebut assertions made in defense counsel's opening statement that the failure of the Ranger undertaking was the consequence of bad business judgment, strikes and inclement weather.[3] The restricted purpose for which the evidence

---

[2] Hilltop Ltd., Chilton Coal Properties, Ltd., and Antares IV, Ltd.

[3] Under United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982), the opening statement of counsel probably was an insufficient basis, standing alone, for such rebuttal. Nevertheless, in the circumstances of the case, the district judge's limiting instructions making entirely clear the narrow significance of the evidence, bearing on motive, intent and absence of mistake, cured any error.

was admitted was repeatedly emphasized in the instructions of the district judge to the jury. The district judge acted well within his discretion under the Federal Rules of Evidence 404(b) inasmuch as the Rule expressly approves admission of evidence of other crimes, wrongs or acts for the purposes of demonstrating "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Next Hunt objects to prosecutorial remarks seeking to identify his trial counsel as a participant in similar questionable conduct. Even accepting, however, that the allusions were improper, several considerations militate against the grant of a new trial because

of the improper comments. The defendants failed to object to the indiscreet statements made in the prosecution's closing argument. Nor may defense counsel's failure to object be excused on the basis of plain error. United States v. Young, 53 U.S.L.W. 4159, 4161 (1984). Furthermore, the admission of the testimony concerning defense counsel's position as a general partner in the Antares IV venture was for an extremely limited purpose precisely identified in the instructions to the jury.[4] Third,

---

[4] The court instructed the jury in the following manner:

> Also, testimony was elicited relative to Mr. Eacret having served as the general partner in the Anteres [sic] project. That evidence, too, was received solely as to the defendant Hunt and for the single purpose of

Hunt, prior to trial, was put on full notice that such an allusion to counsel was to be expected. The government, without success, sought Eacret's disqualification on those grounds.

Other lesser events developing out of unenlightened sparring of counsel do not amount to grounds for reversal and grant of a new trial. That observation extends to objections made by the prosecution during closing argument to statements of defense counsel calling

---

> indicating at most, if at all, that the government may not enjoy the same freedom of access to Mr. Eacret as a witness in this case as it might have to other general partners who testified at this trial, such as Paul Friedberg, who was general partner of the Chilton-Grassy Creek project. Again, that had nothing whatever to do with defendants Welsh or Cline.

attention to the absence of an important witness whose testimony supposedly would have strengthened the government's case. The prosecution rose to rebut the defense assertions by describing the absence of the witness as an unavoidable consequence of surgery from which he was recuperating. It further covers a snide interruption of defense counsel's closing remarks by the prosecutor, who proclaimed that there was an immunity for successful businesses from prosecution. The statement was ill-timed and by no means generally true. It was made worse by self-praise and a sanctimonious reference to the prosecutor's oath of office. The

district judge amply defused those meanmined little squibs, instructing the jury to disregard both comments.

Finally, when arraigned, Welsh was without sufficient funds to retain a lawyer. Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, a federal public defender was appointed. Subsequently, Welsh came into funds adequate to pay a retained lawyer. The consequent order that a fee of $19,000.00 be paid, calculated at a rate of $50.00 per hour for reimbursement for the services of the public defender, plus interest at 10%, has been objected to as not in conformity with the requirements of the Criminal Justice Act. We agree that the Act has

not been fully complied with and remand for reconsideration of the proper allowable fee.

The statutory provisions governing payment to private attorneys under the Criminal Justice Act, particularly as they impose dollar maximums, do not apply when, as here, the federal public defender has been appointed to provide a defense to an indigent. See 18 U.S.C. § 3006A(h)(2)(A).[5] When a defendant who, as an indigent, has benefitted through appointment of private counsel comes into funds, such counsel may "be paid" from those funds. However, § 3006(f) specifies that application of those funds

---

5 "Payments under this subparagraph to a [Federal Public Defendant] organization shall be in lieu of payments under subsection [§ 3006](d) or (e)."

where a federal public defender has been appointed is to be "as a reimbursement." In that fashion, while the full cost of representation by the federal public defender may be ordered reimbursed, United States v. Coniam, 574 F. Supp. 615, 619 (D.C. Conn. 1983), it does not appear appropriate that amounts in excess of cost should be recovered by the United States.

The infirmity in the district court's computation of the amount to be deposited in the United States Treasury as compensation for federal public defender services stems from the fact that the statute allows, and the government has sought, only reimbursement, i.e., repayment, of what

has been expended for legal services for Welsh as a consequence of the provision of a federal public defender. The district judge did not, however, limit himself to what the public defender actually cost. He took into account, in reaching $19,000, the quality of the services rendered, the relatively inadequate compensation afforded to private attorneys appointed under the Criminal Justice Act, the fee range of $20,000 to $25,000 proposed for private representation before Welsh opted for appointment of the federal public defender, comparable fees of competent counsel in the vicinity which the court

determined were in excess of $50 per hour, and "the costs of operating the Public Defender's Office."

Unfortunately, most of those considerations bore on what counsel might be worth, not what counsel actually cost. Even the consideration of costs of the public defender's office was on a generalized, at best a judicial notice, basis. The record simply contains no information from which to establish the amount allowable as a reimbursement under § 3006A(f) of the Criminal Justice Act.

While the case must be remanded for further consideration, one thing seems clear to us. The imposition of an interest charge was fully within the power of the district judge. It merely

insures that, whatever the appropriate amount of the fee, its worth at the time at or as of which it is calculated should not be permitted to erode through the passage of time.[6]

---

[6] Welsh's argument that the entire fee reimbursement issue should be put off for subsequent determination in a civil proceeding is ingenious but unavailing. The Criminal Justice Act appears in the title of the Code devoted to Crimes and Criminal Procedure. The assignment to the court or United States Magistrate presiding over the criminal proceedings of the responsibility to appoint counsel, § 3006A(b), and the related language of § 3006A(f) make it clear that the judge or magistrate presiding in the criminal proceedings is to make the reimbursement order as part of those proceedings.

Nor was jurisdiction dislodged by virtue of Welsh's intervening appeal. 18 U.S.C. § 3006A(c) applies "at any stage of the proceeding, including an appeal." Welsh, following a practice all too common, seeks to summon up constitutional reasons why allowing the fixing of the reimbursement by the judge presiding over the criminal trial at least until the proceedings at the trial level are

Except to the extent of the remand for consideration of the appropriate amount of reimbursement by Welsh, the case is, in all other respects,

AFFIRMED IN PART,

REMANDED IN PART.

---

finally over and done with may not be permitted. It suffices to say that the farfetched contentions have not impressed us.